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Supreme Court, U.S.
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No. 04-163

IN THE

Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, and MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII,

Petitioners,

v.

CHEVRON U.S.A. INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant review to decide if the substantial advancement test for a Fifth Amendment taking, as articulated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and subsequent cases, remains a viable taking theory, when there is no split on this issue among the lower courts and this Court has reaffirmed the test in numerous cases.

2. Whether this Court should grant review to decide the level of scrutiny used in carrying out a substantial advancement analysis in the absence of a split among the lower courts, and where this Court has endorsed the standard applied in the decision below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's rules, respondent Chevron U.S.A. Inc. ("Chevron") states that it is an indirectly wholly-owned subsidiary of ChevronTexaco Corporation, which is a publicly traded company, through the following intermediate entities: Chevron U.S.A. Holdings Inc., Texaco Inc., Chevron Asiatic Limited, Chevron Texaco Overseas Petroleum Inc., Texaco Exploration and Production Inc., and TEPI Holdings Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Since at least 1922, it has been firmly entrenched in this Court's Taking Clause jurisprudence that a taking claim can succeed even in the absence of actual governmental appropriation of property "if regulation goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). At least since *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court has recognized that such a regulatory taking occurs when land-use restrictions fail substantially to advance any legitimate state interest. In *Agins*, the Court addressed a facial challenge to zoning ordinances that restricted the property owners' ability to develop their parcel. *See id.* at 257-59. The Court unanimously held that a taking occurs if challenged legislation "does not substantially advance legitimate state interests." *Id.* at 260. Applying that requirement to the zoning ordinances at issue, the Court found that "the zoning ordinances substantially advance legitimate governmental goals" because they served to "protect the residents of Tiburon from the ill effects of urbanization," *id.* at 261, and "assur[ed] careful and orderly development of residential property with provision for open-space areas," *id.* at 262. Since *Agins*, the Court has repeatedly invoked this substantial advancement test in a variety of different taking contexts, and has applied it to invalidate land-use restrictions in two cases, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Because of the stringent showing necessary to establish a taking under the substantial advancement test, it has been satisfied only very rarely. Only where legislation is so arbitrary that it achieves no substantial advancement of any valid interest may it be invoked by a property owner. Unsurprisingly, this strand of the Court's Taking Clause

jurisprudence has not occasioned as much litigation as the other taking tests. Nonetheless, this Court has reiterated on numerous occasions that the substantial advancement test remains a valid taking theory. *See infra* at 13-14. Similarly, the continued availability of this narrow taking theory has not occasioned any divisions among the lower courts.

This case was one of the rare cases in the lower courts where a piece of legislation did not substantially advance the State's interest and the district court struck the statute under the substantial advancement test. At issue was state legislation purportedly directed at protecting consumers from high retail gasoline prices, but that sought to do so by imposing fundamentally irrational restraints upon certain *lease* arrangements between oil companies and gasoline station operators that demonstrably could not have any bearing on that goal. The district court found a taking under the rationale of *Agins*, and the Ninth Circuit upheld that ruling, based on a factual record showing that the Hawaii law at issue abrogated Chevron's property rights without substantially advancing the State's asserted interest. This fact-specific ruling was squarely within this Court's precedents, and was consistent with the other lower courts that have applied the substantial advancement test. The petition should be denied.

STATEMENT OF THE CASE

Chevron is one of several companies that sell gasoline at wholesale in Hawaii. Chevron and its competitors have three options for selling gasoline to the public at retail. They can sell it themselves at stations they own and operate. They can sell it to individuals who own and operate their own stations ("open" or "two-party" dealers). Or they can sell it to individuals who lease and operate stations owned by the oil companies ("lessee" or "three-party" dealers). The rent control statute at issue here affects only the last category,

lease arrangements between oil companies and station operators.

Chevron sells most of its gasoline through lessee-dealer stations. Chevron enters into two standard agreements with each of its lessee-dealers. Under a lease agreement, the dealer agrees to pay Chevron a monthly rent. Under a supply contract, the dealer agrees to purchase fuel from Chevron to be sold at the station.

While the standard lease agreements run for three-year terms, dealers may transfer their occupancy rights during the course of the term, subject to Chevron's consent and the payment of a fee. The agreements do not restrict the price a dealer can collect for such a transfer. The parties have stipulated that "[a]ssuming everything else remains equal, the market value of the lessee-dealer leasehold reasonably could be expected to increase as the amount of rent payable decreases." ER 64, ¶ 35.[1]

A. Hawaii's Act 257

On June 21, 1997, Hawaii enacted Act 257. The stated purpose of the statute was to combat the effects of concentration in the market for gasoline in Hawaii, which the Legislature believed was causing higher gasoline prices to consumers. The Act sought to accomplish this by, among other things, capping the rent Chevron and other oil companies could collect from lessee-dealers at 15% of the dealer's profit on gasoline sales and 15% of the dealer's gross sales on products other than gasoline (plus an increase to adjust for increases in the oil company's ground lease, where applicable).

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[1] "ER" refers to the Excerpts of Record below. "SER" refers to the Supplemental Excerpts of Record below.

The statute was unaccompanied by any legislative findings that the rents charged to dealers were the cause of concentration in the Hawaii market, that rents caused high prices to consumers, or that capping rents would result in lower prices. The State introduced no evidence below that the Legislature had conducted any hearings or compiled any evidence on these issues.

The statute prevented Chevron from collecting rent for which it would otherwise be entitled to bargain. At each of Chevron's 64 lessee-dealer stations, the law required Chevron to collect less in motor fuel facilities rent than it otherwise would have collected under its current rental program. The parties stipulated that the statute freezes the rents at a level *below* that necessary for Chevron to recoup its expenses associated with its lessee-dealer stations in Hawaii.

B. The Litigation And Evidence Below

Chevron brought this suit to enjoin enforcement of Act 257 as an invalid taking without just compensation in violation of the Fifth Amendment. Chevron argued that the Hawaii law did not "substantially advance legitimate state interests," as required by *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The district court granted summary judgment for Chevron. Pet. App. 94-118. It held that the rent cap provisions would not advance the State's purposes because they provided no mechanism to prevent incumbent dealers from capturing the benefit of the reduced rent simply by transferring their leases at prices that incorporate the increased value of the franchise, with the result that the new dealers would have no savings to pass on to consumers. Pet. App. 108-12 (citing *Yee v. City of Escondido*, 503 U.S. 519, 527-31 (1992)). The district court also observed that oil companies could offset any rent reduction merely by raising wholesale gasoline charges. Pet. App. 113-17.

On appeal, the Ninth Circuit held that the district court had applied the correct legal standard in requiring that the statute substantially advance a legitimate state interest, and that the district court had properly focused on whether the rent control statute would in fact achieve its goals. Pet. App. 58-66. It held that the substantial advancement test in this context requires only that a "reasonable relationship" exist between the legislation and the goals it was designed to advance. Pet. App. 76. But it held that the district court had "'short-circuited the fact-finding process'" under that standard by resolving the issue without a trial. Pet. App. 72. The State unsuccessfully petitioned for rehearing, and then sought review by this Court in a petition raising substantially the same issues as those raised in the present petition. This Court denied *certiorari*. *Cayetano v. Chevron U.S.A. Inc.*, 532 U.S. 942 (No. 00-1198, Mar. 26, 2001).

On remand, following additional discovery, the case was tried before the district court. The evidence established the following:

(1) *There was no direct benefit to consumers*. Both sides agreed that the rent reductions mandated by Act 257 would not directly lower prices for consumers. As the State acknowledged to the district court, "[b]oth [parties'] economists agree that as a matter of economic principle, this will not happen. If the dealer has money in his pocket [from a rent reduction], it is not expected that he will hand it over to the consumer in the form of lower prices." SER 41; *see also* SER 46-49.

(2) *High gasoline prices are not caused by lessee-dealer rents*. The State's expert admitted that any high gasoline prices in Hawaii are not caused by the rents charged to lessee-dealers. Indeed, it was stipulated that the monthly rent Chevron charges its lessee-dealers does not cover Chevron's expenses associated with its lessee-dealer stations, and has not for at least twenty years. ER 60, ¶ 23. The

State's expert identified several factors contributing to high gasoline prices in Hawaii — none of which were addressed by Act 257 — including concentration at the wholesale level, relatively high State gasoline taxes, and high entry barriers at the wholesale level. SER 11-18.

(3) *Retail prices would go up if the oil companies responded to Act 257 by raising their wholesale gasoline prices.* Both sides' experts testified that the price consumers pay for gasoline would increase if the oil companies raised their wholesale prices in response to the rent cap. SER 6, 31, 47, 49. While the parties differed over whether such a response was likely, the State's expert conceded that oil companies factor into their wholesale gasoline prices the company's expenses associated with the station. SER 7, 32-33. If companies cannot recover station expenses in rent payments from dealers, they will therefore increase gasoline prices. The State did not cross-examine Chevron's expert, or offer any rebuttal evidence, on this point.

(4) *To the extent that wholesale (and thus retail) prices did not rise, the statute would result in decreased investment in lessee-dealer stations, contrary to the purpose of the statute.* Both sides also agreed that if the oil companies did *not* recoup their lost rental revenue by increasing wholesale prices, the result would have been a reduced incentive to invest in lessee-dealer stations (as opposed to the other means of conveying their gasoline to consumers discussed above). SER 36-39.

(5) *Act 257 would allow incumbent dealers to capture a premium rather than lowering dealer costs.* While the State initially argued that the law would help lessee-dealers to stay in business by lowering their costs, ER 142, ¶ 23, the evidence established that any rent reduction would create a premium in the value of the service station leasehold that would be reflected in the leasehold's sale price. The

incumbent dealers could capture this premium by selling the franchises at prices reflecting their increased value.

(6) *Decreases in dealers' costs would be irrelevant to consumer welfare, because the key decision whether to invest in dealer stations is the oil company's, not the dealer's.* It was undisputed that the decision whether to keep a station in business ultimately belongs to the oil company that owns it, not the lessee-dealer. SER 20, 36. To the extent that Act 257 resulted in reduced rental income to the company, it would hasten rather than delay the point at which continued operation became uneconomic for the oil company. ER 110-11, ¶ 26.

Given the foregoing evidence, the district court ruled that Act 257 failed substantially to advance a legitimate state interest, and entered judgment for Chevron. Pet. App. 30-53. It found that, rather than decreasing the price of gasoline in Hawaii, the "direct effect of Act 257 will actually be to cause retail gasoline prices to *increase*." Pet. App. 44, ¶ 31 (emphasis added).[2] The district court also found that, absent such offsetting price increases, oil companies would "avoid investing in new and existing lessee-dealer stations," leading to "fewer lessee-dealer stations than there would be without Act 257." Pet. App. 49, ¶ 49.

The Ninth Circuit affirmed. Pet. App. 24. It reiterated its holding from the previous appeal that the substantial advancement test is a valid taking theory under this Court's and its own cases, finding the State's argument to the contrary to be barred by the law of the case. Pet. App. 6-13. It also reiterated that the intermediate "reasonable relationship" standard was the proper requirement for

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[2] In light of this finding, which was undisturbed on appeal, petitioners' distinction between price reduction and avoidance of future price increases, Pet. 2 n.1, is immaterial.

satisfying the substantial advancement test in this context. Pet. App. 13-17. While more exacting than "the more deferential[] rational basis test" urged by the State, this "intermediate level of review" is "less stringent than the 'rough proportionality' test used in the context of exactions under the Takings Clause." Pet. App. 13-14. The court determined that the facts found by the district court were not clearly erroneous, and supported the judgment for Chevron under the foregoing legal standards. Pet. App. 17-24.

Judge Fletcher dissented. He did not dispute the continuing validity of the substantial advancement test; to the contrary, he acknowledged that it is a "test ordinarily applied to zoning and other land use regulations." Pet. App. 25. Moreover, he agreed with the majority that "[t]he evidence put on by the State's expert in support of Act 257 was sufficiently weak, and the countervailing evidence put on by Chevron's expert was sufficiently strong, that the district court did not err in concluding that th[e substantial advancement] test was not satisfied." Pet. App. 26. Nonetheless, adopting a position that petitioners do not advance here, Judge Fletcher opined that the substantial advancement test does not extend to rent control legislation unless it is shown that the legislation will necessarily allow the incumbent lessee to collect a premium upon transfer of the leasehold interest, a showing Judge Fletcher believed had not been made. Pet. App. 26-29.

REASONS FOR DENYING THE PETITION

I. THE CONTINUING APPLICABILITY OF THE SUBSTANTIAL ADVANCEMENT TAKING TEST IS NOT AN ISSUE WARRANTING REVIEW.

Petitioners claim that there is uncertainty in this Court's decisions and among the lower courts over whether the substantial advancement test can be applied to establish a taking claim. No such uncertainty exists. The substantial advancement test is firmly entrenched in this Court's cases

involving a variety of different taking contexts. And there is no split in the lower courts over whether the test is applicable in cases such as this.

A. Petitioners Mischaracterize The Decisions Of Other Lower Courts In An Unsuccessful Effort To Manufacture A Conflict With The Decision Below.

Petitioners try to demonstrate a split in the lower courts by first asserting that the decision below "directly conflicts" with *Brunelle v. Town of South Kingstown*, 700 A.2d 1075 (R.I. 1997), and *Mission Springs Inc. v. City of Spokane*, 954 P.2d 250 (Wash. 1998), which petitioners describe as having held that "challenges to the rationality of government regulation must be brought under the Due Process Clause." *See* Pet. 16. Neither case, however, made any such pronouncement and neither addressed the issue decided by the opinion below.

Brunelle involved a claim by a property owner that local officials had arbitrarily refused to correct an error in zoning his property, which had prevented him from proceeding with a planned building project. The court concluded that no taking occurred because the error had no substantial economic impact or interference with investment-backed expectations given that the project would not have been permitted even absent the error. 700 A.2d at 1081-83. The owner also argued that officials' decision was arbitrary and capricious. In addressing that separate claim, the court stated in a footnote that "the arbitrariness or capriciousness of a particular state action" should be examined under the Due Process Clause rather than the Takings Clause. *Id.* at 1083 n.5. This footnote does not conflict with the decision below. Whether a claim of arbitrariness by local officials in refusing to correct a zoning error arises under the Taking Clause (and, if so, the standard that governs that claim) is a different question from that addressed in this case involving a legislative enactment restricting rent. The Rhode Island

Supreme Court's view of taking analysis in the former context says nothing about its application to the latter. Significantly, the year after it issued *Brunelle*, the Rhode Island Supreme Court recognized the substantial advancement standard as a valid taking test in the land-use context. *See Woodland Manor III Assocs. v. Keeney*, 713 A.2d 806, 811 (R.I. 1998) (citing *Agins* for the proposition that "a taking occurs in situations in which a regulation does not substantially advance legitimate state interests" (internal quotation marks omitted)).

Mission Springs is even further afield, as it did not even mention, let alone question, the substantial advancement test. The plaintiff in *Mission Springs* challenged local officials' allegedly wrongful failure to process a grading permit. *See* 954 P.2d at 252. The permit ultimately issued, so the only challenge was to the procedures leading to that approval. *See id.* at 253-54. Plainly, no substantial advancement challenge would have been available in this context, and none was made or considered by the court. The Court held that due process principles governed the analysis because the allegations involved "arbitrary interference with *that process* lawfully due." *Id.* at 258 (emphasis added).

Similarly groundless is petitioners' claim that the decision below conflicts with *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994), and *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001). Pet. 16-17. The issue in those cases was whether a determination that a particular land use restriction was invalid meant that a per se taking had occurred entitling the landowner to compensation. The courts ruled that no per se taking had occurred — rulings that anticipated this Court's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002). But no question was presented or discussed in either case whether a regulatory taking could be found under the substantial advancement

test. Contrary to petitioners' implicit assumption, a finding of invalidity under state law or under due process principles does not equate to finding that the restriction fails the substantial advancement test, because not all laws that are stricken as arbitrary will fail to further any legitimate purpose (*e.g.*, because they may be unfairly retroactive or contain irrational exemptions that nonetheless do not defeat their overall effectiveness). Indeed, the Florida Supreme Court in *Tampa-Hillsborough* expressly reserved the issue of the applicability of the Taking Clause in that case. *See* 640 So.2d at 58 ("[W]e wish to make clear that our discussion does not bar any person who owned land within maps of reservation from making a [taking] claim against the government."). Thus, there is no inconsistency in holding that such a ruling of invalidity does not necessarily result in taking.

Petitioners' assertion that the decision below conflicts with decisions of other federal circuits, Pet. 17, is likewise erroneous. Far from rejecting the substantial advancement test, *Simi Investment Co. v. Harris County, Texas*, 256 F.3d 323 (5th Cir. 2001) (per curiam), *see* Pet. 17, cites *Agins*, *Nollan*, and *Dolan* as examples of a "takings analysis established by the Supreme Court and this circuit [that] should control constitutional violations involving property rights that have been infringed by governmental action." *Id.* at 323-24 & n.4. Petitioners rely on the court's statement that claims of "illegitimate and arbitrary governmental abuse" could be brought under the Due Process Clause. *Id.* at 323. But the court did not state that such claims would be to the exclusion of a substantial advancement claim under the Takings Clause.

A footnote in *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995), *see* Pet. 17, states, with no analysis or case citations, that what it called "'fails to substantially advance' takings" are not "distinct" taking claims "in the zoning context" "[a]dditional[]" to "just

compensation takings." *Id.* at 1211 n.1. Whatever the court meant by this cryptic comment, it does not create any circuit conflict. The comment was dicta, as the court did not reach the merits of the taking claim, but rather dismissed it as unripe. *See id.* at 1212. And, in accord with the Ninth Circuit's ruling below, the Eleventh Circuit has subsequently expressly reiterated that the substantial advancement test remains fully applicable, including in the zoning context. *See, e.g., Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th Cir. 1996) (holding in the zoning context that, if a challenged law "does not substantially advance legitimate state interests," a taking claim is established (citing *Agins*)).

Rather than conflicting with the decision below, *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001), *see* Pet. 17, affirmatively cited *Agins* for the rule that a "land use regulation does not effect a taking if it substantially advances legitimate state interests," *id.* at 1352 (internal quotation marks and brackets omitted), and found substantial advancement of a legitimate purpose because the revocation of a mining permit "was an exercise of the police power directed at protecting the safety, health, and welfare of the communities surrounding the Rith mine site by preventing harmful runoff," *id.* Similarly, *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *see* Pet. 17, cited and applied *Agins*, concluding that a mining restriction satisfied the substantial advancement test because "the preservation of wetlands bears a substantial relationship to the public welfare as perceived by the best lights of our time." *Id.* at 904.

Finally, *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999), *see* Pet. 19, also recognizes the validity of, and applies, the substantial advancement test to a rent control law. *See* 968 P.2d at 1000-04. There, the California Supreme Court concluded that the requirement was satisfied because the plaintiff had "not allege[d] that the Santa Monica Rent Control Law fail[ed] to advance the purpose of

preventing excessive and unreasonable rent increases caused by the shortage of and increased demand for housing in the City or that existing tenants ha[d] not obtained protection from excessive or unreasonable rent increases." *Id.* at 1003 (internal quotation marks and ellipsis omitted).

B. This Court Has Not Cast Doubt On The Continuing Applicability Of The Substantial Advancement Test.

Petitioners' claim that various Justices of this Court have expressed uncertainty over the validity of the substantial advancement test is also wrong. Pet. 9. In a wide variety of cases spanning more than a quarter of a century, this Court has consistently recognized the "substantial advancement" test as a valid means of establishing a taking claim. While the showing it requires has rendered it inapplicable except in rare cases, many cases have reaffirmed its availability. The first express articulation of the test occurred in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), where the Court found it "implicit" in earlier cases that an interference with property rights "may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Id.* at 127. Two years later, in *Agins*, the Court expressly held that legislation interfering with property rights must "substantially advance legitimate state interests" to withstand a Taking Clause challenge, and the Court applied that requirement in upholding challenged zoning ordinances. 447 U.S. at 260.

This Court has since repeatedly reiterated the availability of the substantial advancement test in a long and unbroken line of cases. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002) (noting that property owner could have made the argument that non-exaction land-use restrictions "did not substantially advance a legitimate state interest" to support a taking claim); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) (noting that jury

instruction requiring "that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions" was "consistent with our previous general discussions of regulatory takings liability"); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'" (quoting *Agins*, 447 U.S. at 260)); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (noting that the Court had recognized the validity of the substantial advancement test "on numerous occasions"); *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992) (noting that there must be "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance"); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'" (quoting *Agins*, 447 U.S. at 260)); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (noting that the substantial advancement test represents part of "our general approach" in takings cases).

These cases recognize the applicability of the test in taking cases generally, and not just in cases involving "exactions" (*i.e.*, required transfers of interests in real property to secure development approvals). *See, e.g.*, *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 233-34 (noting that theory could have been advanced in non-exaction case); *City of Monterey*, 526 U.S. 704 (noting consistency of substantial advancement theory with the Court's precedents "outside the context of required dedications or exactions" even though the precise application had not been delineated); *Yee*, 503 U.S. at 530 (noting applicability of test outside exactions context); *Nollan*, 483 U.S. at 841 ("We are inclined to be *particularly* careful about the adjective ['substantial'] where the actual conveyance of property is made a condition to the lifting of a land-use restriction" (emphasis added)). Indeed, *Agins* itself involved a challenge

to zoning ordinances rather than an exaction, so petitioners' suggestion that the substantial advancement test has not been applied outside the context of exactions is incorrect. Pet. 9-10, 12. Moreover, while petitioners equivocate regarding whether they accept the substantial advancement test as valid even in the exaction context, their merits arguments against the substantial advancement doctrine would apply with equal force to the exaction context.

In the face of all of these cases, petitioners rely primarily on *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). That case offers petitioners no support. *Eastern Enterprises* involved a challenge to provisions of the Coal Health Benefits Act that imposed retroactive liability for retired coal miners' health benefits upon coal operators with attenuated relationships with those miners. *See id.* at 514-15. The focus of the Taking Clause dispute involved whether monetary obligations between private entities of the sort imposed by the statute in that case constitute takings. *Compare id.* at 522-24 (concluding that "economic regulation such as the Coal Act may nonetheless effect a taking") *with id.* at 541-47 (concluding that the Taking Clause did not apply because the statute imposed only an economic burden and did not burden a "specific property right or interest") (Kennedy, J., concurring in the judgment and dissenting in part). The plaintiffs made no claim that the statute failed substantially to advance a valid purpose, and no such claim could have been advanced in that case, because the law plainly advanced the public purpose of funding the benefits to retired miners. Indeed, the plurality (which included the only justices to find a taking) did not even cite *Agins* or allude to the substantial advancement test. Rather, it applied the alternative three-prong test for a regulatory taking. *See id.* at 529.

Unsurprisingly in light of the fact that there was no substantial advancement claim at issue in *Eastern Enterprises*, Justice Kennedy's concurring opinion did not

question that the theory was a valid means of establishing a taking claim. To the contrary, Justice Kennedy expressly *presupposed* its validity. Justice Kennedy cited the substantial advancement test in the course of discussing why, in his view, courts should require a high degree of specificity in identifying "a specific property interest to implicate the Takings Clause." *Id.* at 544. Justice Kennedy noted the perceived "uneasy tension with our basic understanding of the Takings Clause," *id.* at 545, not to *question the applicability* of the substantial advancement theory — for that would have undercut his statement that special care is required in identifying property rights with specificity — but rather to *presuppose* it as a ground for justifying caution in defining the range of cognizable taking claims. *See id.* at 544-45. In short, Justice Kennedy's concurrence in *Eastern Enterprises*, a case that did not involve the substantial advancement theory, offers no support to petitioners. Any doubt on this score is removed by the post-*Eastern* decisions in which the Court has reaffirmed the applicability of the test. *See Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 334; *City of Monterey*, 526 U.S. at 704. Indeed, Justice Kennedy, in writing for the Court in *City of Monterey*, acknowledged that the trial court's instruction on the substantial advancement test was consistent with this Court's takings precedents. 562 U.S. at 704.

The opinion of the dissenters in *Eastern Enterprises* is similarly unavailing to petitioners. The dissenters did not mention the substantial advancement test or cite *Agins*, let alone call that test into question. And each of the dissenting Justices in *Eastern Enterprises* subsequently joined the opinion of the Court in *Tahoe-Sierra*, which cited the test as an avenue the plaintiff there could have invoked to challenge the land-use restrictions. 535 U.S. at 334.

Apart from *Eastern Enterprises*, petitioners' only other ground for claiming that there is "[u]ncertainty" about the continued applicability of the substantial advancement test,

Pet. 9, is that the opinions of Justice Scalia and Justice Souter in *City of Monterey* expressed no opinion on the applicability of the substantial advancement test in that case because it had been waived. *See* 526 U.S. at 732 n.2 (Scalia, J., concurring in part and concurring in the judgment) ("As the Court explains, petitioner forfeited any objection to this standard and I express no view as to its propriety." (citation omitted)); *id.* at 753 n.12 (Souter, J., concurring in part and dissenting in part) (offering "no opinion" on the substantial advancement issue). Of course, the failure to express an opinion because an issue is not properly before the Court is not to cast doubt upon a question on the merits. Petitioners mischaracterize these opinions in claiming that they "acknowledg[e] that it is at least an open question." Pet. 9. Indeed, petitioners ignore that Justice Scalia in *City of Monterey* joined the majority's conclusion that the substantial advancement instruction in that case was "consistent with our previous general discussions of regulatory takings liability," *id.* at 704; *see id.* at 723 (Scalia, J., concurring in part and concurring in the judgment) ("I join all except Part IV-A-2 of Justice KENNEDY's opinion.").

C. Petitioners Offer No Valid Reason To Reconsider The Substantial Advancement Test For The First Time Now, In The Absence Of Any Split In The Lower Courts.

Petitioners' claims that the substantial advancement test would "effect a dramatic change in takings jurisprudence," Pet. 12, or herald a return to *Lochner*-era activism, Pet. 15, are unfounded. The foregoing shows that the substantial advancement taking test is deeply embedded in this Court's Taking Clause jurisprudence At the same time, the test is rarely applied because it invalidates governmental action only in extraordinary cases such as this where a law is so wholly ineffective or arbitrary as to substantially further no valid state objective. As this Court emphasized in *Nollan*, it

has "made clear" that "a broad range of governmental purposes and regulations satisfies these requirements." 483 U.S. at 834-35 (collecting cases). The very fact that the substantial advancement test has been available for decades without triggering any widespread invalidation of state legislation or lower court split underscores that there is no confusion or crisis in the federal courts warranting this Court's review.

Nor are petitioners correct that review of legislation under the Taking Clause should be no more searching than under the Due Process Clause. Pet. 15. The Due Process Clause is directed primarily toward ensuring the adequacy of *procedural* safeguards in protecting personal interests generally (including interests in "life" and "liberty," as well as "property"). *See, e.g., Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992) (noting that "[t]he most familiar office of th[e Due Process] Clause is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State"). While the Court has recognized an application of that clause in prohibiting certain undue substantive intrusions, "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process" to protect interests not specifically delineated in the Constitution. *Id. See also Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 543-44 (1977) (White, J., dissenting) ("[W]e must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.").

The Taking Clause, by contrast, is a specific provision directed solely toward protecting the right of "private property" against governmental appropriation. It supplies an independent ground to inquire into the effect of legislation in the context of intrusions on property rights, such as the right

at issue here, to collect real property rents. As the Court held in *Dolan*, the Taking Clause is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment," and it should not "be relegated to the status of a poor relation." 512 U.S. at 392.[3]

Petitioners' other merits argument — that the remedy in a taking case is compensation rather than invalidation of a statute and that therefore the substantial advancement test is at odds with the purposes of the Clause, Pet. 12 — is similarly incorrect. Where legislation attempts to convert private property without affording the compensation required under the Clause, this Court has recognized that enjoining the legislation is appropriate. As the *Eastern Enterprises* plurality noted without disagreement from any other Justices, "it would entail an utterly pointless set of activities" if the government were to appropriate money and then pay a claim for compensation, "for every dollar [taken] . . . would be presumed to generate a dollar of . . . compensation." 524 U.S. at 521 (internal quotation marks and brackets omitted). In these circumstances, "it cannot be said that monetary relief against the Government is an available remedy," and, accordingly, it is proper for the taking itself to be declared unconstitutional and enjoined. *See id.* In keeping with these principles, this Court has on several occasions enjoined legislation under the Taking Clause. *See, e.g., Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997) (affirming invalidation of provision of Indian Land Consolidation Act); *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987) (same); *Webb's*

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[3] Thus, petitioners' reliance upon *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), is misplaced. Pet. 22-23. In *Exxon*, the Court addressed due process and other challenges to a State law. No claim under the Taking Clause was asserted or addressed, and there is no ground to suppose that any substantial advancement claim even could have been made against that entirely different legislative scheme.

Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 160 (1980) (holding that taking "was obviously uncompensated" and violated Taking Clause). Indeed, this was the remedy in this Court's seminal regulatory taking decision, *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). As this Court has noted, in that case "the Court held that the statute was *invalid* as effecting a 'taking' without just compensation." *Penn Cent. Transp. Co.*, 438 U.S. at 127-28 (emphasis added).

Petitioners' reliance upon *First English Evangelical Lutheran Church v. County of Los Angeles, California*, 482 U.S. 304 (1987), to support a contrary conclusion is misplaced. Pet. 12. *First English* merely observed that the purpose of the Taking Clause is to require compensation rather than to impose substantive limits on lawmaking power. *See* 482 U.S. at 314. It did not address the separate issue of what remedy is appropriate where a statute on its face improperly burdens a property interest but does *not* provide the required compensation. Nothing in *First English* indicates that a damages remedy on an inverse condemnation claim is the sole remedy available to a plaintiff, and it did not so much as hint that it had overruled *Pennsylvania Coal* or the other cases authorizing injunctive relief. *See, e.g.*, *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). While *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), presumed that claims for compensation against the United States should be brought in the Court of Federal Claims before taking claims could be asserted in district court, *see id.* at 1016, this presumption does not apply in cases involving monetary takings, where compensation would defeat the entire purpose of the challenged legislation, rending a *post facto* compensation claim "an utterly pointless set of activities." *Eastern Enters.*, 524 U.S. at 521 (internal quotation marks omitted).

II. THE LEVEL OF SCRUTINY IN APPLYING THE SUBSTANTIAL ADVANCEMENT TEST IS NOT AN ISSUE WARRANTING REVIEW.

As noted above, the Ninth Circuit did not apply "[*d*]*e* [*n*]*ovo* [r]eview" of the legislative judgment, as petitioners claim. Pet. 23, 27. Rather, it noted that there were several possible levels of scrutiny, including a stricter "rough proportionality" test used in the land exaction cases, and the rationality standard used in some due process cases. Pet. App. 14. And it expressly adopted "an intermediate level of review, more stringent than the rational basis test used in the due process context but less stringent than the 'rough proportionality' test." Pet. App. 14. The Ninth Circuit referred to this intermediate level as a "'reasonable relationship' test." Pet. App. 13-14. While the decision below rejected "the more deferential[] rational basis test" suggested by petitioners, Pet. App. 13, it did not adopt a *de novo* approach, but rather expressly took a middle ground, affording the State's judgment more deference than it would receive in other substantial advancement contexts. Pet. App. 13-14.

Contrary to petitioners' assertions, no lower court split exists on these issues. An intermediate standard is precisely what other lower courts have adopted, and what this Court's cases require.

A. Petitioners Have Identified No Lower Court Split Regarding The Appropriate Level of Scrutiny In Applying The Substantial Advancement Test.

Petitioners cite four cases allegedly evidencing a split among the lower courts regarding the level of scrutiny to be applied in carrying out the substantial advancement analysis. None supports petitioners' argument.

South County Sand & Gravel Co. v. Town of South Kingstown, 160 F.3d 834 (1st Cir. 1998), did not "h[o]ld that

the 'substantial relation' and 'rational basis' standards may be used 'interchangeably' in reviewing a challenged zoning ordinance," as claimed by petitioners. Pet. 28. To the contrary, it expressly declined to decide that question, explaining, "[w]e need not probe the point today, for the outcome of this case would be the same under either standard." 160 F.3d at 836 n.3.

Far from disagreeing with the decision below, *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999), Pet. 28-29, expressly adopted the precise intermediate standard used by the Ninth Circuit in this case. After rejecting the more exacting "essential nexus" standard used by *Nollan* as limited to the context of exactions, *id.* at 975-76, *Bonnie Briar Syndicate* ruled that "the applicable standard" outside the exactions context is whether the legislation "'bears a *reasonable relationship* to that objective.'" *Id.* at 976 (quoting *City of Monterey*, 536 U.S. at 701) (emphasis in *Bonnie Briar Syndicate*). This is the same standard, drawn from the same Supreme Court case, as that adopted by the Ninth Circuit here. Pet. App. 13-14.

Finally, the decisions of the Supreme Court of California in *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999), and *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87 (Cal. 2002), are similarly consistent with the decision below. *Santa Monica Beach* rejected application of the heightened *Nollan* and *Dolan* exaction standard to the rent control ordinance challenged in that case, but expressly declined to decide what standard was applicable. *See* 968 P.2d at 1002. And *San Remo Hotel* rejected application of the *Nollan* and *Dolan* exaction standard to an ordinance governing hotel conversions, but expressly adopted the "reasonable relationship" standard used by the Ninth Circuit in this case. *See* 41 P.3d at 105-06 (holding that the legislation "must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development," and that

"[w]hile the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees . . ., the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster").

In short, all of petitioners' cases either apply the identical standard to the decision below or expressly decline to decide the issue.

B. Petitioners' Proposed Rationality Standard For Reviewing Legislation Under The Substantial Advancement Test Is Inconsistent With This Court's Precedents And Would Abrogate The Test.

Petitioners' proposal that the substantial advancement test outside the exactions context should employ the due process rational basis standard is also incorrect on the merits. By its terms, this Court's requirement that legislation *substantially* advance a valid state interest requires a different inquiry from mere rationality review. This Court emphasized this distinction in *Nollan*, where it observed that "our verbal formulations in the takings field have generally been quite different" from those in the Due Process context. 483 U.S. at 834 n.3 (noting that substantial advancement test is facially different from due process rational basis standard).[4]

In keeping with this observation, this Court's cases have consistently indicated that the substantial advancement test requires more than mere due process rationality review, even outside the exaction context. As noted above, the Ninth

[4] Contrary to petitioners' characterization, Pet. 26-27, *Nollan* does not justify a rational basis standard outside the exaction context. Its statement that courts should be "*particularly* careful about the adjective" "substantial" in the exaction context necessarily means that the substantiality requirement applies outside that context as well. 483 U.S. at 841 (emphasis added).

Circuit drew its "reasonable relationship" standard from *City of Monterey*, where this Court commented favorably on that formulation without definitively resolving the issue. *See* 526 U.S. at 704 (noting that the reasonable relationship standard used in that case was "consistent with our previous general discussions of regulatory takings liability"). Similarly, *Yee* indicated that in the rent control context there must be "a sufficient nexus between the *effect* of the ordinance and the objectives it is supposed to advance." 503 U.S. at 530 (emphasis added). That inquiry is simply not encompassed in the due process rational basis test, which does not look to the actual effect of legislation.

Petitioners rely on *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). Pet. 24-25, 27. Yet the language they quote from that case involves a separate issue: the requirement that takings, even where compensated, must involve a "public use." *See* 480 U.S. at 487 n.16. In his dissent, Chief Justice Rehnquist expressly emphasized this limitation: "[O]ur inquiry *into legislative purpose* is not intended as a license to judge the effectiveness of legislation." *Id.* at 511 n.3 (Rehnquist, C.J., dissenting). When courts inquire into the separate issue of whether a taking is for a public use, they look at purpose rather than effectiveness, and they use a more deferential standard in doing so. *Keystone* discussed and applied the *Agins* substantial advancement test in a separate portion of the opinion. *See id.* at 492-97. And the more deferential standard applied to the "public use" prong of the Taking Clause analysis is sensible, because unlike in the substantial advancement context, the state is there paying for the property it takes. *See, e.g., Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir. 1997).

Moreover, applying the rational basis standard from the due process context in applying the substantial advancement test, as petitioners suggest, would be incoherent, because it would render the substantial advancement test wholly

superfluous. Any law that fails the due process rational basis standard would independently be unconstitutional under the Due Process Clause; therefore, one would never need to reach the *Agins* test. If the substantial advancement inquiry were not heightened beyond the minimal Due Process rationality requirements, the substantial advancement theory would be legally inert, contrary to the numerous cases of this Court establishing that test as a valid independent theory under the Taking Clause.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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